
IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS 10
FOR THE NINTH CIRCUIT

No. 7433

UNITED STATES OF AMERICA,
Appellant,

vs.

MARTHA LaFAVOR, as Administratrix
of Estate of CHARLES V. LaFAVOR,
deceased, and LUCY ANN LaFAVOR,
Appellees.

Upon Appeal from the District Court of the
United States for the Western District
of Washington, Southern Division.

HONORABLE EDWARD E. CUSHMAN, Judge

BRIEF OF APPELLEES

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I N D E X

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STATEMENT OF THE CASE

The appellees admit that the appellant has set

forth a proper and correct statement of the issues involved as presented to the Jury.

A R G U M E N T

The appellees will not burden the Court with discussion of specifications of error Nos. I, II, III, IV, V, VI, VII and VIII, inasmuch as the Court is familiar with the Law, and in view of all the evidence submitted in the trial of this case, which took up the better part of three days, there is no prejudice shown by appellant's obvious desire to pick out these isolated incidents on which to base error.

This case turns squarely on the question of the sufficiency of all the evidence to sustain the verdict of the Jury and the judgment of the Court. Cases cited by appellant are not in point, in as much as those cases stood on their own facts.

The evidence in this case was rather voluminous, and an attempt will be made to boil it down, with special reference to appellee's Exhibits, Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 26, introduced in evidence and sent up as a part of the record.

These exhibits show "that the examining physician of the Draft Board pronounced him in good health August 6, 1917; that he was admitted to the

base hospital at Camp Lewis January 3, 1918. Diagnosis: Pleurisy, chronic, fibrinous, thickened pleura. Later records also in evidence show he was tapped five times during the period January 3, to January 27, 1918. On January 27, 1918, he contracted influenza and from 14 tests, 7 showed positive for diphtheria and 7 negative. X-Ray on January 14, 1918, showed interlobular adhesion left-heart pushed a little to right; he spent a total of 98 days in the hospital at Camp Lewis.

The clinical records in various base hospitals in France show that he was wounded and gassed September 29, 1918, and lay in a shell hole. Diagnosis December 14, and 16, 1918: 1. Pleurisy, acute, left adhesive. 2. Arthritis chronic, involving left hip joint. All in line of duty. 3. Marked tenderness over left sacroillac joint and left lumbar region—complains of pain in left chest.

His field medical card shows: 1. Gas—Wounded. Diagnosis: 1. Gas inhalation. 2. Concussion from explosion. 3. Myositis—traumatic lumbar region. 4. Left adhesion pleurisy. 5. Arthritis chronic left hip joint.

Clinical records of October 4, November 7, November 26, December 5, December 23, and December 30, 1918, read as follows: Thrown in dugout by

shell explosion. 1. Neuresthenia. 2. Coughs, backache, nervous, sleeps poorly, weak, walks in a cramped position, shows tenderness and pain over left sacroillac joint. Diagnosis: 1. Concussion from explosion. 2. Manipulation and strapping at Orthopedic Clinic. 3. Myositis Traumatic. 4. Nature of disability: Pleurisy-athritis, chronic, left hip joint in line of duty.

Clinical records of the Government from December, 1920, on, show over the years, diagnosis as follows: 1. Concussion and gassed—pain in back since concussion. 2. Conjunctivitis chronic—strain of sacroillac joint. 3. Complains of shortness of breath, weak back, pain in back of left hip on stooping over, frequent headaches, blurring of eyes, nauseated and vomiting after breakfast. 4. Findings—result of an injury to spine from shell concussion, and this affects his legs, the left one the worse. Diagnosis: Arthritis, chronic, sacroillac bilateral—walks with limp favoring left leg—neuresthenia.

The succeeding Government findings up till the date of his death show a progressive impairment. Plaintiff's exhibit 24 admitted without objection. Rated LaFavor temporary total on February 15, 1927.

During the eighteen months he was in the service, he spent over six months in the hospital, 98 days at Fort Lewis and 92 days in France. The record shows that he was an apprentice in the electric plant at Scobey, Montana, from April to July, 1919, at \$90.00 per month and worked as a cereal packer in a flouring mill from July 7, 1919, to January 15, 1920, at \$100.00 a month and was off work three or four months during that time. His wife testified that he only worked four hours a day at any of this work from the day he was discharged, and that he had to come home and lie down at ten o'clock in the morning and would not go back to work until after two o'clock in the afternoon. She testified fully and completely of his inability to continuously follow any gainful occupation from the day he arrived home after his discharge in March, 1919, until the day of his death. Her testimony was that she saw him and observed him every day; that he had vomiting spells in the morning; could not maintain continued physical exertion; walked with a limp; and after 1923, periodically had spells when he apparently lost his mind. Pictures were placed in evidence showing the contrast in his physical appearance before and after his discharge. Of course, there was conflicting testimony, but the jury decided that in our favor. The Government's testimony, however, absolutely fails to show that he did

work continuously at any substantial, gainful occupation after his discharge, and their own clinical records are full of references to his war-time sickness and injury as being the cause of his physical incapacity. Doctor Goering positively testified that LaFavor was suffering in 1931, among other things, from traumatic arthritis which in his opinion had its origin in the war, and that such disease rendered him totally and permanently disabled under the terms of the policy.

A careful reading of the Government's clinical record as shown by the Exhibits above referred to, together with the other evidence introduced on behalf of the appellees, presents the true picture of Charles V. LaFavor's condition from the date of his discharge. The appellant's effort to break down this case by evidence of witnesses who observed the deceased only occasionally for short periods, totally fails.

The evidence submitted to the Jury clearly shows that the deceased was totally and permanently disabled from continuously following any substantially gainful occupation from March 24, 1919; it clearly shows an onward progressive disability to the date of his death. From that date until he died, there is no evidence in the records anywhere that he was capable of, or did continuously follow

any substantially gainful occupation.

We therefore pray that the judgment of the District Court be sustained.

A. W. NEWMAN,
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Attorneys for Appellees.

